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In The
Supreme Court of the
United States

October Term, 1993

HAWAIIAN AIRLINES, INC.,

-against-

GRANT T. NORRIS,

Petitioner,

Respondent.

AND

PAUL J. FINAZZO, HOWARD E. OGDEN
and HATSUO HONMA,

-against-

GRANT T. NORRIS,

Petitioners,

Respondent.

*On Writ of Certiorari to the Supreme
Court for the State of Hawaii*

BRIEF OF THE ALLIED EDUCATIONAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

BERTRAM R. GELFAND
JEFFREY C. DANNENBERG
(Counsel of Record)
SPECTOR, SCHER, FELDMAN
& STERNKLAR

*Attorneys for Amicus Curiae
The Allied Educational Foundation
655 Third Avenue
New York, New York 10017
(212) 818-1400*

SW

St. Louis & Westervelt, Inc.
NY (212) 684-3117 NJ (201) 863-8133

(4259)

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INTEREST OF THE AMICUS CURIAE

Allied Educational Foundation ("AEF") is a non-profit public interest group devoted to supporting the development of public policies that contribute to a free society in which the rights of individuals guaranteed by the United States Constitution are fully protected. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions. Supporters of AEF include representatives of business, labor and the general public.

It is the belief of AEF that the ability of labor and management to resolve disputes in an atmosphere of equality is vital to the strength of the economy of the United States. Unnecessary government interference upsets this balance and creates a risk of economic strife that weakens the American economy. The judicial process is a critical area for maintaining a free society, and the public interest is best served by a legal structure that permits, to the fullest extent possible, the resolution of disputes between employers and employees by collective bargaining, with a minimum of governmental interference, in the free pursuit of the negotiating process by both sides. AEF is concerned that a determination adverse to the position of the respondent in this matter will effectively sanction inappropriate governmental interference in the collective bargaining process.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief by AEF on behalf of respondent.

STATEMENT OF THE CASE

Respondent was terminated from his employment because he was a "whistleblower." The basic issue presented on this appeal is whether the pre-emption doctrine precludes an employee, such as respondent, covered by a collective bargaining from availing himself of a cause of action arising from his termination, where he would otherwise have been entitled to assert such a cause of action under state law if his employment were not covered by a collective bargaining agreement.

In the decision below, the Supreme Court of Hawaii denied a motion by the employer to dismiss the state action of the employee. In so proceeding, the Court stated:

Our review is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Norris v. Hawaiian Airlines, Inc., 842 P.2d 634, 637 (Haw. 1992) (quoting *Love v. United States*, 871 F.2d 1488, 1491 (9th Cir. 1989)). Accordingly, it is respectfully submitted that, for jurisdictional purposes, this Court should accept as true the factual allegations set forth in respondent's complaint.

In summary, respondent alleges that he was wrongfully discharged by his employer, petitioner Hawaiian Airlines, Inc. ("HAL"),¹ from his job as an aircraft mechanic. At HAL, respondent was responsible for making aircraft repairs and, thereafter, returning the aircrafts to service. As a mechanic licensed by the Federal Aviation Administration ("FAA"), respondent was not permitted to approve for service any aircraft or part that did not meet safety guidelines.

On July 15, 1987, respondent was inspecting the landing gear on one of HAL's DC-9 aircrafts, when he discovered that a critical part of the landing gear was damaged. Respondent investigated further and found that the axle sleeve, which normally has a smooth surface, was so badly scarred, gouged and burned that, in its present condition, the plane's entire landing apparatus was in jeopardy of failing. Although respondent and the other mechanics present believed that the axle sleeve needed to be changed at once, respondent's supervisor directed the mechanics to hand-sand the part and to return the aircraft to service. After the plane was returned to service, respondent was directed by his supervisor to certify the maintenance record, indicating that the repair had been performed satisfactorily and that the plane was airworthy. Respondent refused and was immediately suspended. Later that day, respondent notified the FAA of the danger that he perceived as a result of the maintenance

¹ Petitioners in this appeal include HAL and certain of HAL's officers and managers.

procedures that had been performed on the HAL DC-9. Thereafter, respondent returned to the HAL office at which he worked and reported to an Assistant Director what had happened, including his having contacted the FAA. In response, the Assistant Director summarily terminated respondent on the spot.

As a result of respondent's communications, the FAA inspected the HAL DC-9 in question and seized the axle sleeve about which respondent had reported. Several months later, the FAA notified HAL that it was to be the subject of a broader FAA investigation. Prior to the official commencement of the investigation, however, an FAA investigator caught HAL employees removing axle sleeves from several aircrafts. The FAA ordered that the removed sleeves be turned over to it. HAL advised the FAA, however, that almost all of the sleeves had been "lost" or "misplaced." Ultimately, following the FAA's issuing a report of findings and conclusions regarding the facts surrounding the disappearance of the axle sleeves,² HAL agreed to pay a fine of \$360,000, resolving all charges that had been brought involving this incident.

After his termination, respondent invoked the grievance procedures outlined in the collective bargaining agreement between HAL and respondent's union, the International Association of Machinists,

² Among other things, the FAA found that HAL had made 958 flights with the axle sleeve that had been reported as damaged by respondent.

entered into pursuant to the provisions of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188. That agreement provides that an employee may be disciplined only for just cause. Citing a provision of the agreement that an aircraft mechanic "may be required to sign work records in connection with the work he performs," HAL argued that respondent had been terminated for insubordination.

Prior to the grievance hearing, HAL offered to reduce respondent's punishment from termination to suspension, with the understanding that "any further instance of failure to perform duties in a responsible manner" could result in discharge. Respondent disregarded the offer and, instead, instituted this action in Hawaii state court. The gravamen of respondent's complaint is that the retaliatory acts of HAL's employees resulting in his termination violated public policy as articulated in the Hawaii Whistleblowers' Protection Act ("HWPA"), Haw. Rev. Stat. §§ 378-61 through -69 (1988 & Supp. 1992), as well as in the Federal Aviation Act and the Federal Aviation Regulations. The lower state courts dismissed respondent's state retaliatory discharge claims for lack of subject matter jurisdiction, on the ground that state jurisdiction was pre-empted by the RLA. The Supreme Court of Hawaii reversed, holding that the RLA did not pre-empt respondent's claims. *See Norris v. Hawaiian Airlines, Inc.*, 842 P.2d 634 (Haw. 1992).

SUMMARY OF ARGUMENT

The resolution of respondent's retaliatory discharge claims depends upon factors that would not require an interpretation of the collective bargaining agreement. Accordingly, these claims are not pre-empted by the RLA.

The State of Hawaii has statutorily enunciated the public policy that employees should be afforded protection from retaliation based upon their having reporting wrongdoing or unsafe working conditions. Such public policy is also found in the Federal Aviation Act and the regulations promulgated thereunder. Encouragement of so-called whistleblowers is fundamental to government's capacity to safeguard the public from wrongdoing. The instant case is poignantly illustrative of this concept. The alternative to state statutory protection of the workers--that is, countenancing the public's being exposed to the risks of traveling in unsafe commercial aircrafts--need not be embraced, inasmuch as respondent's claims do not arise under a collective bargaining agreement, and the state litigation of these claims does not offend the principles underlying the RLA.

Indeed, the dismissal of respondent's claims on the ground that they are pre-empted by federal legislation relating to the resolution of disputes under collective bargaining agreements would improperly deprive respondent, and others like him, of the same access to state worker protection laws as is afforded to

nonunion members, who are not covered by a collective bargaining agreements. It was never intended that state laws designed to protect all workers should be foreclosed to some workers simply because they are unionized.

ARGUMENT

I. Respondent's Retaliatory Discharge Claims Are Not Pre-empted By The RLA

A. Pre-emption Is Unjustified Under a "Major" Dispute/"Minor" Dispute Analysis

Much is made in petitioners' brief concerning the purported distinction between the standard, most recently reiterated by this Court in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989), for classifying labor disputes under the RLA as "major" or "minor," and the standard articulated by the Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), for the pre-emption of state law by federal law. *Amicus* respectfully submits that, to the extent that there exists any such distinction, it is irrelevant to the facts in this case. Although *Lingle* involved an application of Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and not the RLA, the policy reasons furnished by this Court in connection the pre-emption doctrine are equally germane:

[I]f the resolution of a state-law claim depends upon the meaning of a collective

bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor law principles--necessarily uniform throughout the nation--must be employed to resolve the dispute.

Id. at 405-06 (footnote omitted). Where, as here, there exist independent state worker protection laws, under which claims may be asserted that will create no risk of results that are inconsistent with any federal labor law principles, there is no reason to keep the state claim from proceeding, to the same extent as if plaintiff were not a unionized employee.

Disputes between labor and management arising under the RLA have been classified as either "major" or "minor" for the purposes of determining whether arbitration should be mandated. This Court adopted the "major/minor" terminology "as a shorthand method of describing two classes of controversy Congress had distinguished in the RLA: major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corp.*, *supra*, 491 U.S. at 302 (citing *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711 (1945)). In the event of a "major" dispute, the statutory bases of which are Sections 2 (seventh) and 6 of the RLA, 45 U.S.C. §§ 152 (seventh) and 156, the parties are required to undergo a lengthy process of bargaining and

mediation. "Once this protracted process ends and no agreement has been reached, the parties may resort to the use of economic force." *Id.* at 303.

Consolidated Rail Corp. did not, itself, involve an application of the pre-emption doctrine; instead, that case arose from a challenge by a collection of labor organizations to an employer's addition of drug testing procedures to routine physical examinations. *See id.* at 300. In determining that the matter should be arbitrated because resolution of the dispute necessarily involved an interpretation of the collective bargaining agreement, the Court held "that if an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior regulation, and if that claim is arguably justified by the terms of the parties' agreement (i.e., the claim is neither obviously insubstantial or frivolous, nor made in bad faith), the employer may make the change and the courts must defer to the arbitral jurisdiction of the Board." *Id.* at 310.

At bar, logic dictates that no "interpretation" (indeed, no reference) to the collective bargaining agreement is necessary in order to resolve respondent's claim that he was terminated in retaliation for his having gone to the FAA with information of what he perceived to be a dangerous situation, violative of FAA guidelines, that could result in a loss of human lives. The only provision of the collective bargaining agreement that petitioners argue is applicable is Article XVII.F, which provides that "[a]n employee's refusal to perform work

which is in violation of established health and safety rules, or any local, state or federal safety law shall not warrant disciplinary action." (Appendix to the Petitioner for a Writ of Certiorari, at 60a-61a) However, this provision does not relate at all to the factual basis of respondent's retaliatory discharge claims, which is that respondent was disciplined not for a work refusal, but for reporting to the FAA wrongdoing and a dangerous condition at HAL that involved a serious hazard to the public.

Where, as here, an action taken by an employer is not even "arguably justified" by the collective bargaining agreement, the dispute cannot be deemed "minor," and, therefore, the forum for resolving a grievance arising out of that action is not limited to the arbitral mechanism of the RLA. *Id.* at 307. As the Court below found:

[Respondent's] retaliatory discharge claim is based on his allegation that he was terminated for reporting a violation of the law, and [petitioners] do not suggest that a retaliatory discharge is sanctioned or justified by a provision in the agreement, nor do they point to any part of the CBA which demonstrates that the carrier and union have agreed on standards relative to [respondent's] situation.

Norris v. Hawaiian Airlines, Inc., 842 P.2d 634, 644 (Haw. 1992). Thus, under the standard articulated in

Consolidated Rail Corp., inasmuch as the claim need not (and, indeed, cannot) be resolved by reference to the collective bargaining agreement, the RLA is not implicated, and, therefore, the RLA does not pre-empt the retaliatory discharge claims asserted by respondent.

B. Respondent's Claims Also Survive Scrutiny Under The More Traditional Standard for Pre-emption

The "major/minor" test was established by this Court in *Burley* and *Consolidated Rail Corp.* in the context of claims brought against employers in the United States District Court for violation of the RLA. Federal courts have jurisdiction to decide "major" disputes. *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 673 F.2d 700, 706 (3d Cir. 1982). "Minor" disputes, on the other hand, "concern the interpretation or application of collective bargaining agreements, and are resolved through binding arbitration before the System Board of Adjustment." *International Ass'n of Machinists v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985). Federal courts do not have subject matter jurisdiction to resolve "minor" disputes. *Id.*; see also *International Ass'n of Machinists and Aerospace Workers v. Alaska Airlines, Inc.*, 813 F.2d 1038 (9th Cir. 1987), cert. denied, 108 S. Ct. 290 (1988); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 789 F.2d 139 (2d Cir. 1986).

Amicus respectfully submits that the "major"/"minor" test is not appropriate to determining

whether an action, such as this one, brought in state court under state statutory or common-law worker protection principles should be pre-empted by the RLA. Instead, the traditional standard articulated by this Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), which was employed (at least in part) by the Court below, should be applied. Although *Lingle* arose in the context of Section 301 of the LMRA, 29 U.S.C. § 185, its underlying principles are applicable in any case in which federal labor laws are invoked in an effort to pre-empt state law.

For example, this Court held in *Lingle* that, if resolution of the claim requires interpretation of the terms of a collective-bargaining agreement, the state law should properly be deemed pre-empted by federal labor law. See *id.* at 407 n.7. Applying this standard to the facts in *Lingle*, the Court analyzed the elements of plaintiff's state tort claim of retaliatory discharge for filing a workers' compensation claim: "(1) he was discharged or threatened with discharge and (2) the employers' motive . . . was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights." *Id.* at 407 (citation omitted). In defending against such a claim, the employer "must show that it had a nonretaliatory reason for the discharge." *Id.* Based upon this analysis, the Court held, "the state-law remedy in this case is 'independent' of the collective bargaining agreement in the sense of 'independent' that matters for preemption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.*

In the case at bar, it is impossible to resolve respondent's retaliatory discharge claims by construing the collective bargaining agreement, inasmuch as his claims are wholly independent of that agreement. Here, as in *Lingle*, respondent's claims pertain "to the conduct of the employee and the conduct and motivation of the employer. [None] of the elements [of the claims] requires a court to interpret any term of a collective-bargaining agreement." *Id.* As was the case in *Lingle*, "this purely factual inquiry . . . does not turn on the meaning of any provision of a collective-bargaining agreement." *Id.* Accordingly, inasmuch as no interpretation of the collective bargaining agreement is required to evaluate respondent's claims, those claims are not pre-empted by the RLA.³

³ Parenthetically, petitioners' additional argument that Congress has expressly committed "whistleblower" claims to RLA jurisdiction (see Opening Brief of Petitioner, at 12-14) is simply not the case. Indeed, petitioners point to no provision of the RLA that proscribes retaliatory discipline by employers. Instead, petitioners cited a "whistle blower" provision in the Federal Rail Safety Act of 1970, 45 U.S.C. § 421 *et seq.* as somehow providing a basis for the contention that the RLA contains such a provision. To the contrary, the RLA contains no such provision. (If anything, the fact that Congress chose not to include such a provision in, or to add such a provision to, the RLA is an indication of Congressional preference that state retaliatory discharge claims not be deemed pre-empted by the RLA.)

II. Dismissal of Respondent's State Law Claims Would Improperly Deprive Respondent of The Benefit of Worker Protection Legislation

A. Depriving Respondent of Protection Under the HWPB On The Basis of His Union Membership Interference With The Collective Bargaining Process

So-called "whistleblower" statutes have become a central element of a broad spectrum of state legislation aimed at shielding employees from retributive conduct on the part of their employers. *See generally* Westman, *Whistleblowing: The Law of Retaliatory Discharge*, at 177-87 (BNA 1991). Most states have now adopted whistleblower statutes protecting governmental employees, and some fifteen states have adopted statutes that protect private sector employees.⁴

It seems self-evident that the broad, far-reaching public policy concerns addressed by the Hawaii state legislature in the HWPB would be frustrated if one class

⁴ See Statement of Daniel Westman, *Hearing on H.R. 1664, Corporate Whistleblower Protection: Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 102d Cong., 2d Sess. (1992). The states that have enacted whistleblower legislation covering private sector employees include California, Connecticut, Florida, Hawaii, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Tennessee and Wisconsin. *See* Barnett, *Overview of State Whistleblower Protection Statutes*, 43 Lab. L.J. 440 (1992).

of employees within the state--that is, employees covered by collective bargaining agreements--were deprived of the protections set forth in this legislation. Such deprivation would be unfair to those employees who chose to join a union and would deprive the public of the benefit of information known to that large portion of the labor force that is unionized.

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, provides employees with a federally protected right to uninhibited, unconditional participation in the collective bargaining process. The exclusion of unionized workers from state worker protection laws could, therefore, easily disrupt the "balance of power designed by Congress" that this Court has referred to in the context of employer-employee relations. *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986).

Indeed, a real danger exists that such a disruption of the employer-employee relationship could create a chilling effect on the collective bargaining process generally. For example, employees considering whether to join a union would first have to weigh the value of lost state labor benefits against the benefit of union membership. This factor places an unfair burden on the union in collective bargaining, inasmuch as employers do not lose any of their comparable state law rights when they enter collective bargaining. Indeed, the prospect of loss of state labor law protection that would result from the dismissal of the respondent's claims could be a powerful weapon in the hands of an anti-union

employer.⁵

As this Court stated in *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967):

National labor policy has been built on the premise that by pooling their economic strength and acting through a

⁵ Such a scenario would be tragically inconsistent with a fundamental tenet of American labor law that the government should foster employee organization and promote equity in bargaining between employers and employees. For example, the findings and policies set forth in the NLRA provide, in pertinent part:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151; see also *NLRB v. Jones & Laughline Steel Corp.*, 301 U.S. 1, 45 (1937) ("[t]he theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel").

labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.

Id. at 180. The Court has also recognized that "both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (citations omitted). Just as an employer comes into negotiations with the authority under state common law to exercise fundamental managerial prerogatives, workers come to collective bargaining with certain legal rights that underpin their bargaining position, such as the protections afforded to all employees by state labor laws. See *id.* Consistent with this balance of power, this Court has consistently ruled that unionized workers should not be penalized for their collective bargaining activity by the loss of minimum state labor standards. See, e.g., *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Yet, depriving respondent of protection under the HWPB on the sole basis that he is covered by a collective bargaining agreement would create just such a penalty.

B. Public Policy is Best Served by Allowing Claims Asserted Under State Worker Protection Laws to be Litigated

Whistleblower protection laws are specifically designed to protect workers from employer abuses. For example, the HWPB provides, in pertinent part, that an employer:

shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because . . . [t]he employee . . . reports or is about to report to a public body . . . a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false.

Haw. Rev. Stat. § 378-63(a) (1988). The Act authorizes an employee to file a civil action seeking injunctive relief and actual damages. *See id.* § 378-63(a) (1988). This legislation is typical in that it is intended to curtail one of the "most catastrophic events that can happen in life[,] the sudden and unexpected loss of gainful employment," Raab, *Time for an Unjust Dismissal Statute in New York*, 54 Brook. L. Rev. 1137, 1161 (1989), where that termination is predicated on an employer's retaliation for an employee's justified act of disclosing to an

appropriate authority the employer's wrongdoing which adversely affects the general public.

Critical to the importance of allowing the whistleblower protection laws to provide remedies for claims such as respondent's is that the whistleblower laws encourage employees to report the presumably illegal acts of their employers without fear of retribution. Clearly such a goal cannot be deemed offensive to the RLA. It would be Kafkaesque irony to allow petitioners to invoke the worker protection safeguards Congress promulgated in the RLA in order to defeat different, unrelated worker protection safeguards promulgated by the State of Hawaii. As one commentator observed, business and industry groups often seek to have state laws pre-empted when "they have found state regulatory schemes more burdensome, or their enforcement more aggressive, than pertinent federal legislation." Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U.L. Rev. 685, 691-92 (1991) (footnote omitted). Professor Hoke warns:

The shortcomings resulting from current preemption practice have a broader impact than that of fortifying the substantive injuries to the public that flow from misguided or weak national regulation [I]t kills off one line, perhaps even an entire scheme, of a particular community's law. Further, the law slayed by a preemption ruling arises from the political and legal bodies that are

both closest and most amenable to practical political efforts by average citizens. A federal preemption ruling authoritatively revokes state and local governmental power over the subject matter and effectively affirms that power may be exercised solely by the national governmental bodies.

Id. at 694 (footnotes omitted).

Were this Court to hold that the RLA pre-empts the Hawaii whistleblower statute, then the grave public policy concerns addressed by the Hawaiian legislature in this legislation would, in this instance, be eviscerated.

CONCLUSION

For the foregoing reasons, the Order of the Court below should be affirmed. An employee's right to protection from retaliatory discharge, which the State of Hawaii, under its police powers, deemed worthy of specific legislation should not be denied as a result of a collective bargaining agreement flowing from respondent's membership in a union. It is not equal enforcement that is offensive to federal law, it is the denial of equal enforcement that is prohibited by federal law.

Respectfully submitted,

BERTRAM R. GELFAND
JEFFREY C. DANNENBERG
(Counsel of Record)
SPECTOR, SCHER, FELDMAN &
STERNKLAR
655 Third Avenue
New York, New York 10017
(212) 818-1400

Attorneys for
Allied Educational Foundation
Amicus Curiae